LIBRARY
SUPREME COURT, U. S.

JUN 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1406~~ 175

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Petitioners,*

v.

ANGUS J. DE PINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Respondents.*

BRIEF OF RESPONDENTS ANGUS J. DE PINTO, AND JAMES P. DONOHUE, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DE PINTO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENISON KITCHEL
363 North First Avenue
Phoenix, Arizona

JOHN P. FRANK
114 West Adams Street
Phoenix, Arizona

Attorneys for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument	3
1. "Conflict" with Decisions of This Court	3
2. "Conflict" with Decision of the Fourth Circuit	4
3. Erie R. Co. v. Tompkins	5

AUTHORITIES CITED

Concordia Ins. Co. v. School District No. 98, 51 S.Ct. 275, 282 U.S. 545, 75 L.Ed. 528 (1931)	3
Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487	4, 5
Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144 (1959)	3
United States Fire Ins. Co. v. Wooten, 71 F.2d 580 (4th Cir. 1934)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1406

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Petitioners,*

v.

ANGUS J. DE PINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Respondents.*

BRIEF OF RESPONDENTS ANGUS J. DE PINTO, AND JAMES P. DONOHUE, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DE PINTO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME Now the Respondents Angus J. DePinto, and James P. Donohue, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, and present this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Petitioners Provident Security Life Insurance Company, and Albert J. Doig.

STATEMENT OF THE CASE

On October 18, 1957, the officers and directors of United Security Life (later merged with Provident Security Life Insurance Company) caused to be transferred to American Security Investment Company assets having a face value of $314,794.19 in exchange for 30,800 class A common shares of American. American then transferred such assets to James E. Kelly in exchange for stock of United. At the time of the transaction, the resignation of Respondent Angus J. DePinto, as a member of the Board of Directors of United, had been accepted. He was not aware of the transaction and had nothing to do with it. He had no financial interest in United or American and did not benefit in any way from the transaction. (R.T. 197-199, 208-209, 494-495)

The Trial Court instructed the jury that DePinto could be held liable for damages sustained by United as a result of said transaction, by reason of his failure to attend directors' meetings, failure to examine minutes, failure to make inquiry as to important transactions of the corporation, and failure to act with respect to transactions potentially harmful to the corporation (R.T. 578). It was not claimed that DePinto was guilty of fraud or wrongdoing, or that he benefited in any way from said transaction.

With respect to damages, the Trial Court instructed the jury as follows:

> "In your computation of damages, the value, if any, you find of the American Security Investment Company stock received by United Security Life, as disclosed by the evidence, should be deducted from your findings as to the amount of

the value of the assets transferred to Kelly." (R.T. 587-588)

The jury rendered a verdict against DePinto in the amount of $314,794.19. In order to reach such verdict, the jury must have concluded that the assets transferred by United to American (and by it to Kelly) had a value of $314,794.19, and that the 30,800 shares of American stock, received by United in exchange, had no value. When the Trial Court entered judgment upon the verdict against DePinto, it included interest at the rate of 6% per annum from October 18, 1957, which, at the time of entry of judgment, amounted to approximately $140,000. The Court of Appeals ordered the judgment modified to provide that interest would run only from the date of the judgment.

ARGUMENT

1. "Conflict with Decisions of This Court

Petitioners do not contend that the claim against DePinto was liquidated and that interest should, therefore, run from the date of the transaction on October 18, 1957. Relying upon *Concordia Ins. Co.* v. *School District No. 98,* 51 S.Ct. 275, 282 U.S. 545, 75 L.Ed. 528 (1931), they argue that, in the absence of an "authoritative" state decision to the contrary, a Federal Court may, in order to arrive at a fair compensation, allow interest as an element of damage, even when the claim is unliquidated. The complete answer to Petitioners' argument is found in an "authoritative" decision of the Supreme Court of the State of Arizona to the contrary. In the case of *Schwartz* v. *Schwerin,* 85 Ariz. 242, 336 P.2d 144 (1959), the Supreme Court

of the State of Arizona considered a number of its prior and conflicting decisions involving the question of interest. It approved and applied the general rule that interest upon an unliquidated claim will run only from the date of judgment, and expressly overruled three of its prior decisions to the contrary. In passing, the Supreme Court of Arizona said:

> "This court in Arizona Eastern R. Co. v. Head, 26 Ariz. 259, 224 P. 1057, 1059, stated:
>
> > '* * * If the claim is unliquidated and is in dispute no interest is allowed upon the theory that the person liable does not know the sum he owes and therefore can be in no default for not paying.' (Citing cases.)
>
> and in the recent case of American Eagle Fire Ins. Co. v. Van Denburgh, 76 Ariz. 1, 257 P.2d 856, it was held that on an unliquidated claim interest should only be allowed from date of judgment. Cf. Borrow v. El Dorado Lodge, 75 Ariz. 218, 254 P.2d 1027."

The Court of Appeals recognized and applied the "Arizona rule". In the face of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, it had no alternative.

2. "Conflict" with Decision of the Fourth Circuit

The decision of the Court below is not in conflict with the decision of the Fourth Circuit Court of Appeals in *United States Fire Ins. Co.* v. *Wooten,* 71 F.2d 580 (4th Cir. 1934). That case did not involve the "Arizona rule".

3. Erie R. Co. v. Tompkins

Petitioners contend that *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, should be overruled. In response, we deem it sufficient to point out that the reasoning of Justice Brandeis is as valid and persuasive today as it was when he wrote his opinion in 1938.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DENISON KITCHEL
363 North First Avenue
Phoenix, Arizona

JOHN P. FRANK
114 West Adams Street
Phoenix, Arizona

Attorneys for Respondents